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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 971

JOSEPH AGO STASSI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EDWARD R. SCHOWALTER,
Counsel for Petitioner.

JACOB J. AMATO,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph Ago Stassi, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered December 28, 1945 (R. 43), affirming a judgment of conviction for violating Regulation 626.1 made pursuant to Selective Training and Service Act of 1940, as amended.

Opinion Below

The opinion of the Circuit Court of Appeals (R. 40-43) is reported in 152 F. (2d) 581.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered December 28, 1945 (R. 43) and petition for a rehearing (R. 40-72) was denied February 18, 1946 (R. 72). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925. See also Rule 11 of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

1. Whether an appellate court may sustain a judgment of conviction on a theory different than that on which the case was prosecuted in the court below.

2. Whether Regulation 626.1(b) made pursuant to Selective Training and Service Act of 1940, as amended, is so vague, indefinite and uncertain as to provide no ascertainable standard of guilt and to violate the due process clause.

Statute and Regulation Involved

The pertinent provisions of Section 11 of the Selective Training and Service Act of 1940 (50 U. S. C. Appendix, Section 311) are as follows:

> Offenses and Punishment.
>
> "Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *."

Section 626.1(b) of the Regulations, at the time in question, read as follows:

> "Each classified registrant shall, within 10 days after it occurs, and any other person should, within 10 days after knowledge thereof, report to the local board in writing any fact that might result in such registrant being placed in a different classification."

Statement

Petitioner was convicted in the United States District Court for the Eastern District of Louisiana on an indictment (R. 3-5) consisting of one count and charging a violation of Section 11 of the Selective Training and Service Act (50 U. S. C. Appendix, Section 311) in that he failed to perform a duty required of him under Regulation 626.1(b), made pursuant to said Act and sentenced to serve thirty (30) months and to pay a fine of Five Hundred ($500.00) Dollars.

Petitioner appealed from the judgment of conviction to the Circuit Court of Appeals for the Fifth Circuit, prosecuting said appeal upon the clerk's record of proceedings pursuant to Rule 8 of the Criminal Appeals Rules promulgated by this Court May 7, 1934. The sole question raised on said appeal was whether Regulation 626.1(b) is so vague, indefinite and uncertain as to fix no ascertainable standard of guilt and to violate the due process clause.

The Circuit Court of Appeals, in its opinion affirming the judgment of conviction, expressed the opinion by way of dictum "that the regulation under attack affords an ascertainable standard of guilt and is constitutional," but held that under its view of the case it was "not necessary to decide the constitutional question, since apart from the regulation the indictment is sufficient to charge an offense under Code Section 311." The Court further held that

"when we strip away Selective Service Regulation 626.1(b) and leave only the quoted excerpt of Section 11, just adverted to, we find that the indictment clearly and plainly charges a violation of this statute and is in no wise vague, indefinite or uncertain."

Petitioner thereupon moved that a transcript of the charge delivered to the jury by the trial court (R. 58-72) be filed and made a part of the record on appeal herein, which motion was granted (R. 58).

This transcript (R. 61-62) shows that the court in charging the jury as to the law of the case stated:

> "The indictment, which is a mere accusation and not evidence against the accused charges that the defendant, a registrant of Selective Service Local Board No. 2 in and for the Parish of Tangipahoa, State of Louisiana, did unlawfully, knowingly, wilfully and feloniously fail and neglect to perform a duty required of him under the provisions of the Selective Training and Service Act of 1940 as amended, and the rules, regulations and directions made and issued pursuant thereto, by failing and neglecting to report to his Local Board, in writing or otherwise, certain facts which might have resulted in the defendant Stassi being placed in a different classification than that in which he was placed during the period from July 1, 1943 to May 21, 1944, the said facts being that he, the said Stassi, though having obtained employment at Delta Shipbuilding Company, Inc., was not during the period aforesaid, a full time, regularly employed workman averaging forty-eight hours per week at Delta Shipbuilding Company, that he was chronically absent from said employment, having worked only the number of days specified in each of the months in question; and that during the period aforesaid, he was principally engaged in the operation of his barroom at Hammond. You will, of course, examine the indictment for a more complete statement of the charge.

"Now the particular statute with reference to this charge is Section 11 of the Selective Training and Service Act, which to the extent here pertinent provides that 'Any person who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act shall upon conviction be punished in the manner therein provided.'

"The applicable Regulations, which are binding on the defendant only to the extent that he may know about them, is number 626. This regulation to the extent here pertinent provides that 'Each classified registrant shall, within ten days after it occurs, report to the local board in writing any fact that might result in such registrant being placed in a different classification.' "

The transcript (R. 66) further shows that after the jury had retired they returned to court and submitted the following question:

"We would like to know how many hours per week, per month or per year are required by law of a defense plant worker to be classified other than 1-A, or to be deferred?"

and that the court thereupon gave the following instruction:

"Now the Court is not in a position, gentlemen, to answer the first question. There is no evidence in the record on that subject and so far as the Court knows, there is no regulation covering it. Counsel tell me that is their understanding of the situation too. The only thing I can do in response to that question is to read you again the language of the applicable regulation, which I shall now do.

"The applicable regulation which is binding on the defendant, only to the extent that he may know about it, is No. 626.1. This regulation to the extent here pertinent, provides that each classified registrant shall within ten days after it occurs report to the Local Board in writing any fact that might result in such registrant being placed in a different classification."

The transcript (R. 68-69) further shows that the jury returned to the court a second time and that the following took place:

"The Court:

"Gentlemen, I received your message that you were unable to agree on a verdict and under the circumstances, because of the fact that you have been deliberating on this case for more than four hours, I have determined to give you further instructions in an effort to assist you in the solution of your difficulties.

* * * * * * *

"You may now retire for further consideration of your verdict.

"Juror:

"May I ask a question? Could you explain the point to what extent the reasonable doubt should be considered necessary to comply with the registration law as to a person obtaining a deferment, working in a war essential industry, what would you consider a reasonable time he should put in that plant, and if he does not put in a reasonable time, isn't he violating his own agreement he made with the Selective Service Board?

"The Court:

"The question is complicated——

"The Juror:

"I am not indicating which way I stand, I am just asking for enlightenment on that point.

"The Court:

"That is really not an issue in this case at all, whether anyone lives up to his moral obligations or otherwise. The issue in this case is whether or not the defendant failed and neglected to perform the duties that were required of him under the Act, whether he knowingly failed to do the things that were required of him under the Act.

"Now the Draft Board is a fact finding tribunal. They make the classifications. The classification is

not permanent; it is no function of this jury to determine whether the defendant is properly or improperly classified at any time. The law imposes the duty under the regulations to report any fact within ten days after its occurrence which might affect his classification."

Petitioner thereupon moved the Circuit Court of Appeals for a rehearing on the ground that the charge submitted by the trial court to the jury furnished proof absolute that petitioner was convicted of violating Section 11 of the Selective Training and Service Act in that he failed to perform a duty required of him under Regulation 626.1(b) (R. 45-72). Petitioner's motion for rehearing was denied without opinion (R. 72).

Reasons Relied upon for Granting Writ

The ruling of the Circuit Court of Appeals that under its view of the case it is not necessary to decide the constitutionality of Regulation 626.1 (b), as petitioner's conviction was based solely upon a violation of Section 11 of the Selective Training and Service Act of 1940, is simply an attempt to sustain the judgment of conviction herein on a theory other than that on which the case was prosecuted in the court below. The indictment and the judge's charge furnish positive and indisputable proof that petitioner was convicted of violating Section 11 of the Selective Training and Service Act, in that he wilfully failed to perform a duty required of him under Regulation 626.1 (b). There is something basically wrong and unjust about a ruling that sanctions the conviction of a man without according him the opportunity to test the constitutionality of the administrative regulation under which he stands convicted. This ruling is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The constitutionality of Regulation 626.1(b) has never been passed upon by this or any other court. Regulation 626.1 (b) requires that every registrant report "any fact that might result" in a change of his classification. The terms it employs are so vague, indefinite, and uncertain that on its face it is repugnant to the due process clause. They fix no ascertainable standard of guilt, in that they command no specific or definite act. The regulation simply commands that a registrant report "any fact", which some prosecutor "might" think up as falling within its questionable scope and which a jury "might" consider "might result" in a change of his classification. The criminality of the regulation thus depends solely upon the viewpoint of the particular jury before whom a charge based thereon is tried, and not upon any definite standard fixed by the text of the regulation.

The fact that an experienced trial judge on two separate occasions, when the jury had returned to the court room and sought instructions on the standard to be applied by them in determining whether petitioner had violated Regulation 626.1(b), was unable to "clear away with concrete accuracy" their difficulties, but simply reread to them Regulation 626.1(b), thus leaving them free to speculate and fix any standard on which they "might" agree, indicates more clearly than any words of counsel the vagueness, indefiniteness and uncertainty of the regulation in question. Petitioner should not be forced to serve two and one-half years for the alleged violation of such a regulation, without first being afforded an opportunity to test its constitutionality.

Argument

I

Section 11 of the Selective Training and Service Act of 1940 makes criminal a wilful failure to perform any duty required of a registrant by the Act, or the rules or regulations made under it. Regulation 626.1 (b) imposes a duty upon each classified registrant to report to his local board in writing "any fact that might result" in a change of his classification.

The indictment in its charging part (R. 4) parallels Regulation 626.1(b) and definitely charges a wilful failure to perform a duty required of petitioner under said regulation, that is, failing and neglecting to report to his local board in writing certain facts which might have resulted in a change of his classification. Moreover the indictment in its conclusion (R. 5) alleges that the offense therein charged is contrary to the Selective Training and Service Act and "especially Regulation Number 626.1."

In addition, the trial court on three separate occasions instructed the jury that petitioner was charged with failing to perform a duty required of him under Regulation 626.1(b) (R. 62; 66-67; 69-70), and on two occasions read to them the pertinent provisions of said regulation (R. 62; 66-67). In fact, the Court's last instruction to the jury was "the law imposes the duty under the regulations to report any fact within ten days after its occurrence which might affect his classification" (R. 69).

That the case was tried and submitted to the jury upon the theory that petitioner failed to perform a duty required of him under Regulation 626.1 (b) cannot be questioned. It is axiomatic that a thing cannot "be" and "not be" at the same time. The charge against petitioner can not "be based" upon Regulation 626.1 (b) for the purpose of

securing his conviction, and "not based" on Regulation 626.1 (b) for the purpose of sustaining such conviction.

The ruling of the Circuit Court of Appeals sustaining the judgment of conviction on a different theory is purely arbitrary and clearly erroneous.

II

It is settled law that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *State of New Jersey*, 306 U. S. 451, 453. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Company*, 269 U. S. 385, 391.

Regulation 626.1 (b) requires that each classified registrant report to his local board in writing "any fact that might result" in a change of his classification. The regulation fixes no ascertainable standard of guilt, in that it commands no specific or definite act. *Connally* v. *General Construction Company, supra*, 269 U. S. 385, 392. The terms it employs to indicate what it purports to denounce are so vague, indefinite, and uncertain that it must be condemned as repugnant to the due process clause. *Lanzetta* v. *State of New Jersey, supra*, 306 U. S. 451.

The regulation does not require the registrant to report any fact which would change his classification, but "any fact that might result" in such a change. "Might" denotes "possibility", not "certainty". It thus commands a registrant, at the peril of going to jail if he guesses wrong, to report "any fact" which a jury "might" consider "might result" in a change of classification. The criminality of the

regulation is thus made to depend solely upon the viewpoint of the particular court and jury before whom a registrant is tried, and not upon any definite standard fixed by the words of the regulation.

Regulation 626.1 (b), in commanding that a registrant report "any fact" which a jury may consider "might result" in a change of classification, falls within the condemnation, which this Court held the sections of the Espionage Act avoided, *Gorin* v. *United States*, 312 U. S. 19, 26, and as to which it had the following to say:

> "The sections are not simple prohibitions against obtaining or delivering to foreign powers any information which a jury may consider relating to national defense. If this were the language it would need to be tested by the inquiry as to whether it had double meaning, United States vs. Reese, 92 U. S. 214, or forced anyone, at his peril, to speculate as to whether certain actions violated the statute, Lanzetta vs. New Jersey, 306 U. S. 451. This court has frequently held criminal laws deemed to violate these tests invalid. United States vs. Cohen Grocery Company, 255 U. S. 81, 89, urged as a precedent by petitioners, points out that the statute there under consideration forbade no specific act, that it really punished acts 'detrimental to the public interest when unjust and unreasonable' in a jury's view. In Lanzetta vs. New Jersey the statute was equally vague. 'Any person not engaged in any lawful occupation, known to be a member of any gang * * *, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster * * *. We there said that the statute 'condemns no act or omission'; that the vagueness is such as to violate due process."

That Regulation 626.1(b) is so vague, indefinite, and uncertain as to fix no ascertainable standard of guilt was demonstrated in a practical way during the trial of the

present case. The jury, after they had retired, returned to the court to seek further instructions and submitted two written questions, the first of which was as follows:

> "We would like to know how many hours per week, per month, or per year are required by law of a defense plant worker to be classified other than 1-A, or to be deferred."

in answer to which the Court stated:

> "Now, the Court is not in a position, gentlemen, to answer the first question. There is no evidence in the record on that subject and so far as the Court knows, there is no regulation covering it. Counsel tell me that it is their understanding of the situation too. The only thing I can now do in response to that question is to read you again the language of the regulation, which I shall now do."

The Court, thereupon, reread to the jury the pertinent parts of Regulation 626.1.

The jury's question clearly indicates that the jurors were confused as to the standard to be applied by them in determining whether petitioner had failed to perform a duty required of him under Regulation 626.1 (b). The rereading of the regulation certainly did nothing to assist them. The fact that an experienced trial judge was unable to clear away their difficulties "with concrete accuracy" points strongly, if not positively, to the fact that it was impossible for the Court to do so, as the regulation is so vague, indefinite and uncertain as to fix no ascertainable standard of guilt.

The fact that the prosecutor has specified a particular act as coming within the terms of the regulation in no way validates it. If the regulation on its face is repugnant to the due process clause, specification of details of the offense

charged in the indictment cannot serve to validate it. *Lanzetta* v. *New Jersey, supra,* 306 U. S. 451, 453.

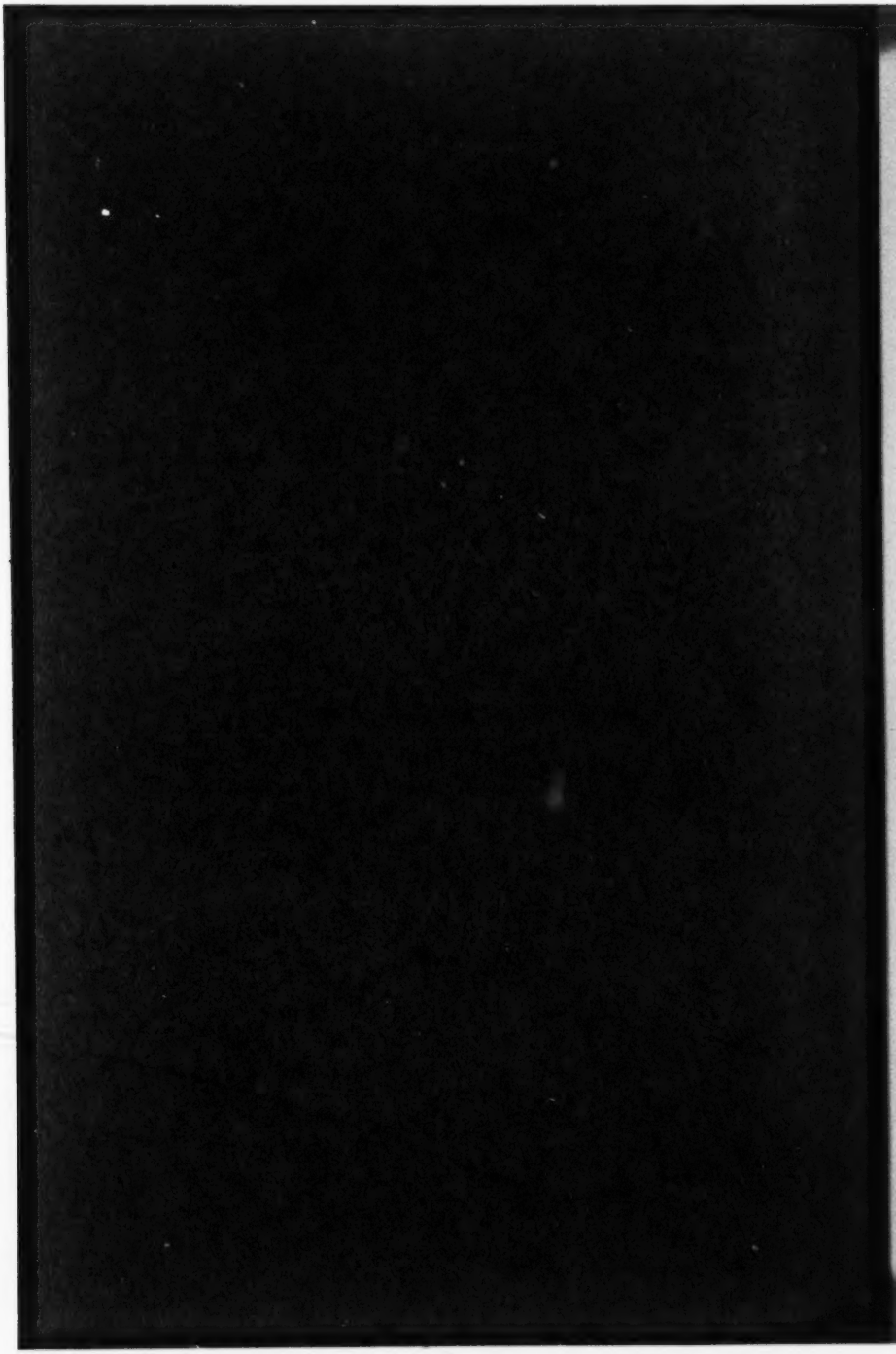
Conclusion

Wherefore, for the foregoing reasons, petitioner, Joseph Ago Stassi, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully submitted,

EDWARD R. SCHOWALTER,
Counsel for Petitioner.

JACOB J. AMATO,
Of Counsel.



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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 971

JOSEPH AGO STASSI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 40–43) is reported at 152 F. 2d 581.

JURISDICTION

The judgment of the circuit court of appeals was entered December 28, 1945 (R. 43), and a petition for rehearing was denied February 18, 1946 (R. 72). The petition for a writ of certiorari was filed March 19, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII

of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, as applied to petitioner, Section 626.1 (b) of the Selective Service Regulations, which requires a classified registrant to inform his local board of any facts which "might result in the registrant being placed in a different classification," is too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 311), provides in part:

> Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *

The applicable Selective Service Regulations provided as follows during the greater part of the period involved in this case:

> 622.22 Class II–B: *Necessary man in war production.* (a) In Class II–B shall be

placed any registrant who is found to be a "necessary man" in war production. (8 F. R. 11346.)

(b) Class II–B deferments shall be for a period of 6 months or less. If there is a change in the registrant's status during the period of deferment in Class II–B, his classification shall be reopened and considered anew. At the expiration of the period of the registrant's deferment in Class II–B, his classification shall be reopened, and he shall be classified anew. In again classifying the registrant, care should be taken not to impede the war production program. The registrant should be again classified in Class II–B for a period of 6 months or less if such classification is warranted and if the registrant's employer has made a reasonable but unsuccessful effort to secure or train a replacement for the registrant during the period of deferment. The same rule shall be applied when again classifying such a registrant at the end of each successive period for which he had been classified in Class II–B. (6 F. R. 6607.)[1]

* * * * *

[1] Subsection (b) was amended on April 20, 1944 (9 F. R. 4385), to read as follows:

"(b) In Class II–B shall be placed any registrant who by reason of his occupation is found to be 'making a contribution' to war production and who is:

(1) Age 38 or over, or

(2) Age 18 through 37, and

(A) Who is found to be qualified for limited military service only, or

(B) Who is found to be disqualified for any military service. (This shall be deemed to include every registrant who

622.24. *"Necessary man" defined.* A registrant shall be considered a "necessary man" in war production or in support of the war effort, including training and preparation therefor, only when all of these conditions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; and (3) he cannot be replaced. (8 F. R. 11346.)[2]

* * * * *

626.1. *Classification not Permanent.* (a) No classification is permanent. * * *

(b) Each classified registrant shall, within 10 days after it occurs, * * * report to the local board in writing any fact that might result in the registrant being placed in a different classification. (6 F. R. 6843.)

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would be placed in Class I–C, Class IV–C, or in Class IV–F if it were not for the fact that he qualifies for classification in Class II–B under the provisions of this section.)"

[2] On April 20, 1944, this Section was amended (9 F. R. 4385), as follows:

"622.24 *'Necessary man' defined.* A registrant shall be considered a 'necessary man' only when all of these conditions exist: (1) He is, or but for a seasonal or temporary interruption would be, engaged in war production or in support of the war effort; (2) his removal would cause a serious loss of effectiveness therein; (3) he cannot be replaced; and (4) he meets such other conditions and qualifications as may be prescribed from time to time by the Director of Selective Service."

STATEMENT

Petitioner was indicted in the District Court of the United States for the Eastern District of Louisiana in one count charging that he knowingly failed to perform a duty required of him by Section 626.1 of the Selective Service Regulations, in violation of Section 11 of the Selective Training and Service Act. The indictment alleged that although petitioner knew he had been given a classification based upon representations that he was a full time worker in a shipyard, he did not inform the local board, as Section 626.1 required of him, that in fact his principal occupation was that of operating a barroom. (R. 3–5.) After a jury trial, he was convicted (R. 26) and sentenced to imprisonment for 30 months and to pay a fine of $500 (R. 30). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 43).

Petitioner has not caused the evidence which was adduced at his trial to be incorporated in the record on appeal. The facts revealed by the indictment (R. 4–5), which must be taken as true in these circumstances (cf. *Miller* v. *United States*, 317 U. S. 192), show that petitioner's principal occupation was the operation of a barroom in Hammond, Louisiana. He registered with Local Board No. 2 for the Parish of Tangipahoa, Louisiana, pursuant to the requirements

of the Selective Training and Service Act of 1940. In 1943, the Delta Shipbuilding Co., Inc., represented to petitioner's local board that petitioner was a full time worker averaging forty-eight hours a week at its plant. On the basis of these representations, the local board on or about July 1, 1943, deferred petitioner as a war worker. Petitioner knew that he had been deferred because of these representations to the local board. Yet, despite his knowledge, he did not inform the local board that his principal occupation was that of operating his barroom and that he worked for the Delta firm only intermittently as follows:

Month:	*Days worked*
July 1943	11
August 1943	0
September 1943	0
October 1943	0
November 1943	10
December 1943	9
January 1944	5
February 1944	21
March 1944	4
April 1944	0
May 1944	0

ARGUMENT

This is not a prosecution of a bona fide war worker who, because of illness or for some other reasons beyond his control, was unable to work full time. Rather, it is the case of a barroom operator who, knowing that he had been deferred from the draft as a full time worker in a shipyard, did not inform his local board that, in fact,

his principal occupation was the operation of a barroom, and that in a period of eleven months, during which he was deferred as an essential war worker, he worked in the shipyard for a total of only sixty days. Petitioner does not deny these facts. His contention is that Section 626.1 (b) of the Selective Service Regulations, upon which the indictment is predicated,[3] is so vague and indefinite as not to provide an ascertainable standard of guilt (Pet. 8, 10–13). We agree that if petitioner is right in this contention, the judgment must be reversed (see *M. Kraus & Bros., Inc.* v. *United States,* No. 198, decided March 25, 1946), but we think it plain that, at least as applied to the facts of this case, the regulation is not unconstitutionally vague and indefinite.[4]

Section 626.1 (b)[5] requires that "Each classi-

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[3] Section 11 of the Selective Training and Service Act makes it an offense, *inter alia*, knowingly to fail to perform a duty required by the Selective Service Regulations.

[4] The circuit court of appeals held that the regulation is valid, and it also concluded that the indictment charged an offense under the provisions of Section 11 denouncing the making of false statements and evasion of service (R. 42). Petitioner contends that the court erred in relying upon this latter theory in affirming the conviction (Pet. 7, 9–10). The trial court submitted the case to the jury on the theory that petitioner was charged with failing to perform the duty required of him by Section 626.1 (b) of the Selective Service Regulations. Hence, we do not rely on the alternative theory advanced by the circuit court of appeals.

[5] Paragraph (a) of that section provides that "No classification is permanent."

fied registrant shall, within ten days after it occurs, * * * report to the local board in writing any fact that might result in the registrant being placed in a different classification." The question which petitioner raises is whether this regulation fairly advised him that it was his duty to inform his local board that his principal occupation was that of a barroom operator and that he was not, as he knew the local board had been informed, a full time shipyard worker.[6]

Section 626.1 (b) does not enumerate every fact of which a registrant is required to inform his local board, because extensive detail of that nature is not feasible. Instead, the requirement is expressed in terms which must be applied to specific factual situations. Conceivably there may be hypothetical cases where Section 626.1 (b) might be so vague in its application as to preclude a criminal prosecution for failing to comply with it. But this case furnishes no occason for such speculation. Cf. *Robinson* v. *United States,* 324 U. S. 282, 285. It is undisputed that petitioner knew that he had been deferred because the local board had been informed that he was a full time

[6] In the summer of 1943, the Selective Service System was stringently enforcing its "work or fight" policy, which required registrants in nonessential occupations such as petitioner's to take work in war jobs or be drafted. See *Selective Service as the Tide of War Turns*, the third report of the Director of Selective Service, pp. 53, 70, 650–651. It is a fair inference that this policy prompted petitioner to take employment with the Delta shipbuilding firm.

shipyard worker. It is likewise undisputed that petitioner's principal occupation was not working in a shipyard; it was operating a barroom. These are facts which not only "might result in the registrant being placed in a different classification," as the regulation provides; they are facts which, of course, required a different classification. It is difficult to conceive of a registrant who, knowing these facts, would not be aware that they were facts which should be brought to the attention of the local board. Particularly is this so where, as in this case, the registrant has actual knowledge of the requirements of Section 626.1 (b).[7] We think no reasonable man could possibly have any question that the facts in petitioner's case were facts which had a direct bearing on his classification and were thus facts which, in the language of the regulation, "might result in the registrant being placed in a different classification."

Moreover, any possible doubt in this case whether petitioner honestly was unable to determine from Section 626.1 (b) whether he was obliged to notify his local board of the true facts, is dispelled by the fact that the jury was required to find that petitioner knowingly failed to perform the duty required of him by the

[7] The trial judge instructed the jury that Section 626.1 was binding on petitioner only to the extent that he had knowledge of it (R. 66). The verdict thus establishes petitioner's knowledge in this respect, and we do not understand petitioner to contend that he was unaware of the terms of the regulation.

regulation. The trial court instructed the jury that "the Act does not denounce as criminal, every failure to perform a duty imposed by the statute or regulations, but only seeks to punish a person 'who shall knowingly fail or neglect' his duty. There must be a specific wrongful intent. An actual knowledge of the existence of an obligation and a wrongful intent to evade it is of the essence." (R. 62.) Certainly, a specific wrongful intent, which the jury found in this case, removes any possibility that petitioner was convicted for violating an "unknowable something." See *Screws* v. *United States,* 325 U. S. 91, 105. "A mind intent upon willful evasion is inconsistent with surprised innocence." *United States* v. *Ragen,* 314 U. S. 513, 524.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IRVING S. SHAPIRO,
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APRIL 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 971

JOSEPH AGO STASSI,
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versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

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CITATIONS.

IN THE
SUPREME COURT OF THE UNITED STATES,
October Term, 1945.

No. 971.

JOSEPH AGO STASSI,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

The government, although conceding that "conceivably there must be hypothetical cases (so referred to only because not yet thought up and reduced to indictment by some prosecutor) where Section 626.1(b) might be so vague in its application as to preclude a criminal prosecu-

tion for failing to comply with it," (Govt.'s Brief, p. 8), contends that "at least as applied to the facts of this case, the regulation is not unconstitutionally vague and indefinite." (Govt.'s Brief, p. 7.)

The government thus asks this Court to determine the constitutionality of Regulation 626.1(b), not from the text of the regulation itself, but from the averments of an indictment attempting to allege an accusation thereunder.

It is settled law "that specification of details of the offense intended to be charged" cannot validate a statute which shows on its face that it is repugnant to the due process clause. "The same strict rule of construction that is applied to statutes defining criminal action," must be applied in determining the constitutionality of Regulation 626.1(b). *M. Kraus & Bros. Inc. v. United States*, 66 S. Ct. 705, 707.

The following language of this Court in *Lanzetta v. State of New Jersey*, 306 U. S. 451, 453, applies with equal force to the present case:

> "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U. S. 214, 221; Czarra v. Medical Supers. 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368; Lovell v. Griffin, 303 U. S. 444. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

The government further states (Govt.'s Brief, p. 8):

> "Section 626.1(b) does not enumerate every fact of which a registrant is required to inform his local board, because extensive detail of that nature is not feasible. Instead, the requirement is expressed in terms which must be applied to specific factual situations."

As a matter of fact, Section 626.1(b) does not set forth a single fact of which a registrant is required to inform his local board, and, therefore, since it commands no specific or definite act, its language fixes no ascertainable standard of guilt. *Connally v. General Construction Company*, 269 U. S. 385, 392.

The argument of the government that it does not enumerate every fact "because extensive detail of that nature is not feasible", but that "instead, the requirement is expressed in terms which must be applied to specific factual situations", thus admitting that the criminality of the regulation depends solely upon the viewpoint of the particular jury applying its terms "to specific factual situations", is a complete concession that "the terms it employs to indicate what it proposes to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause." *Lanzetta v. State of New Jersey, supra*, 306 U. S. 618, 621.

Furthermore, there is no solid basis for the government's argument that the Director in drafting Regulation 626.1(b) intended to impose a duty upon each registrant to notify his local board "of any change in the registrant's

job status". The Instructions on the bottom of Form 42-A, which have the force and effect of a regulation under the terms of Regulation 605.51, establish that the Director has placed this duty upon the employer. Such Instructions read in part as follows:

> *"If the registrant is deferred, the employer must notify the Local Board of any change in the registrant's job status, or if his employment is terminated."* (Italics the Director's.)

If the Director had any intention to impose a similar duty upon the registrant also, he merely had to add just before or after the words "the employer" the necessary connective with the words "the registrant", or he could have imposed a like duty upon registrants by setting forth similar specific language in Regulation 626.1(b). But the Director did not do so, and the omission, whether intentional or otherwise, cannot be supplied by the prosecutor, court or jury.

As said by this Court in *M. Kraus & Bros. Inc. v. United States*, 66 S. Ct. 705, 708:

> "But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication."

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner.

JACOB J. AMATO,
Of Counsel.

I hereby certify that copies of this brief have been served on opposing counsel this ..... day of .....

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